

## ***Dunsmuir v. New Brunswick: Old Wine in a New Bottle***

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On March 7, 2008, something quite revolutionary seemed to happen. The Supreme Court of Canada released *Dunsmuir v. New Brunswick*,<sup>1</sup> and, in so doing, replaced its twenty year old “pragmatic and functional” test for determining standard of review questions with what it now calls, simply, the “standard of review analysis.”<sup>2</sup>

But now, after a few months’ experience with *Dunsmuir*, we are perhaps seeing that not much has really changed. In fact, the old wine, with a bit of refinement, has been put in a new bottle. But it is essentially the same old wine.

To show this, and in order to provide a useful current guide to this notoriously difficult area of law, this paper will be divided into two parts.

In the first part, I examine the current state of standard of review jurisprudence. This summary incorporates the changes made by *Dunsmuir*, and summarizes some of the recent jurisprudence. In the second part, I examine some of the unresolved questions arising from *Dunsmuir*.

### **A. The current state of standard of review jurisprudence**

Broadly speaking, tribunal decisions can be reviewed on the basis of substance or procedure.

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<sup>1</sup> 2008 SCC 9.

<sup>2</sup> *Ibid.*, at para. 63. The “pragmatic and functional” test was first introduced in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

## (1) Review of substantive decisions

A reviewing court may hold the view that a tribunal has reached the wrong decision. It may believe that if it were faced with the issue, it might make a different decision. It might find different facts, or reach different legal conclusions. But a reviewing court does not necessarily interfere with the decision.

The Supreme Court of Canada has made it clear in numerous judgments that reviewing courts must approach decisions made by tribunals with different levels of scrutiny depending upon the circumstances. There are two recognized levels of scrutiny:

- The strictest scrutiny, known as correctness review, allows reviewing courts to substitute their own decision for the tribunal if they think the decision is wrong;
- The higher level of scrutiny, currently called the “revised reasonableness standard” or simply “reasonableness”, allows reviewing courts to interfere in relatively rare circumstances.<sup>3</sup>

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<sup>3</sup> It is unclear precisely what this standard means in the early days of the post-*Dunsmuir* era, but most post-*Dunsmuir* courts are applying the standard set out in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247: where there are “no lines of reasoning supporting the decision which could reasonably lead [the] tribunal to reach the decision it did”. See, for example, *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, at paras. 15-19. This is a fairly strict test. Although the word “reasonableness” is used to describe the standard, courts are not supposed to interfere just because the decision is “unreasonable” – the “no lines of reasoning” language suggests that the standard approaches what used to be known as the “patent unreasonableness” standard. The Supreme Court of Canada in *Dunsmuir* suggested that these two standards were to be collapsed into one and that its decision “does not pave the way for a more intrusive review by courts” (at para. 48). This echoes the words of one Justice of the Supreme Court, LeBel J. (Deschamps J. concurring), who suggested that the “reasonableness” standard and the “patent unreasonableness” standard could be collapsed into one single standard: see *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77. To the extent that the standard of review for this higher category has not changed from the former jurisprudence, then the words used to define the “patent unreasonableness” standard may also be relevant: “clearly irrational, that is to say evidently not in accordance with reason” (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-964 *per* Cory J.) and “so flawed that no amount of curial deference can justify letting it stand” (*Ryan, supra*, n. 3, *per* Iacobucci J.). Sometimes decisions that are so contrary to the purposes and policies of the legislation under which they are made are unreasonable: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R.

The court decides which level of scrutiny either:

- (1) by applying the standard applied under the former jurisprudence, where the jurisprudence has already worked out the particular standard of review to be applied to the decision in question;<sup>4</sup> or
- (2) by asking four questions, similar to what was previously known as the “the pragmatic and functional test.”<sup>5</sup> The four questions are as follows:
  - Is there a “privative clause” in the legislation protecting a decision from being reviewed?<sup>6</sup> Or is there an absolute right of appeal?<sup>7</sup>

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539. Purely punitive remedies that have no rational connection or that are unconstitutional will be unreasonable: *Royal Oak Mines Ltd. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 639. Sometimes where the available evidence is utterly incapable of rationally supporting a finding, unreasonableness will be present: *Toronto (City) v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487.

<sup>4</sup> *Dunsmuir*, *supra*, n. 1, at paras. 57 and 62. The majority emphasizes that “[a]n exhaustive review is not required in every case” to determine the standard of review and “existing jurisprudence may be helpful.” In many situations, the “analysis required is already deemed to have been performed and need not be repeated.” Note, however, that there may be a debate about what the prior jurisprudence says or whether it is satisfactory: see the post-*Dunsmuir* cases of *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32 (compare majority and minority judgments) and *Cousins v. Canada (Attorney General)*, 2008, FCA 226, at paras. 19-20 (lower court treated an earlier decision as a satisfactory precedent on the standard of review when it should not have).

<sup>5</sup> *Dunsmuir*, *supra*, n. 1, para. 55. Under the former jurisprudence, see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q. v. College and Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Ryan*, *supra* n. 3.

<sup>6</sup> A “privative clause” is a provision in legislation that, literally read, tells the reviewing court that it is not to review the decision. The presence of such a clause is a factor in favour of a finding that the standard of review should be highly deferential. A typical example is as follows: “Every order, finding or decision of the Board is final and conclusive and shall not be the subject of any review, further consideration or appeal.” Some privative clauses are less strict. A clause that is less strict is a factor that leads a reviewing court closer to correctness review. Incidentally, the reason why full privative clauses are not read literally is that there is a constitutional principle (the rule of law) that courts must always be able to review tribunal decision-making, albeit on a very light standard: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

<sup>7</sup> The presence of a provision in governing legislation that allows a party to appeal directly to court is a factor in favour of the reviewing court applying a strict, or “correctness”, standard of review. See *Dunsmuir*, *supra*, n. 1, at para. 52.

- What is the expertise of the tribunal in relation to the reviewing court? Who is most expert in the area?<sup>8</sup>
- What is the purpose of the legislation and the provision under which the tribunal made its decision?<sup>9</sup>
- What is the nature of the question before the tribunal: a question of general law, a question of fact, or a question of mixed fact and law or discretion?<sup>10</sup>

As you can appreciate, a reviewing court that is examining a particular tribunal decision may find that these four inquiries take it towards different standards of review. How the four inquiries are to be balanced in such a circumstance is a very subjective assessment. For example, two of the inquiries may push the court towards a correctness standard, while two others may push the court towards a reasonableness standard. In another case, it may be that one inquiry *strongly* pushes the court towards a reasonableness standard while others somewhat lightly push the court towards a correctness standard. It is easy for different levels of court to adopt different conclusions concerning the standard of review in a particular case.<sup>11</sup>

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<sup>8</sup> See *Dunsmuir*, *supra*, n. 1, at paras. 54-55. Securities commissions, for example, are regarded as being expert in the area of regulation of the capital markets. Courts regard them as having more expertise than they do concerning that subject-matter. This is a factor in favour of lighter scrutiny of tribunal decisions. See, e.g., *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672. However, human rights issues before human rights tribunals do not attract deference. Reviewing courts believe that such tribunals are no more expert in such issues than they are: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

<sup>9</sup> See *Dunsmuir*, *supra*, n. 1, at para. 64. The presence of legislation that requires tribunals to examine and/or develop broad issues of public or regulatory policy and apply that policy is a factor in favour of deference to tribunal decision-making. Where, however, the legislation vests the tribunal to apply general law to particular disputes without much specialized appreciation, review may be stricter (*i.e.*, closer to the “correctness” standard).

<sup>10</sup> See *Dunsmuir*, *supra*, n. 1, at para. 53. If the question that is the subject of the judicial review is one of fact, review may be lighter (*i.e.*, more deferential). If the question that is the subject of the judicial review is one of general law, review may be stricter (*i.e.*, closer to the “correctness” standard). For an application of this, post-*Dunsmuir*, see *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para. 109.

However, there is some guidance on the particular mix of factors in the recent case law. Where the question is one of fact, discretion or policy, deference will usually apply automatically. This is also true for the review of questions where the legal and factual issues are intertwined and cannot be readily separated.<sup>12</sup> Courts also defer in cases in which a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity, as opposed to one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.”<sup>13</sup> Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.<sup>14</sup> Questions of constitutional law<sup>15</sup> and “true questions of jurisdiction or *vires*”<sup>16</sup> are reviewable on the basis of correctness.

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<sup>11</sup> Perhaps the most notorious example of this is the Supreme Court of Canada’s decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152. *Monsanto* was a rare case where things appeared so clear that all parties and all levels of court were in agreement up to the Supreme Court of Canada: the standard of review was “reasonableness”. The Supreme Court disagreed with everyone who had ever touched the case! It held that the standard of review was “correctness”.

<sup>12</sup> *Dunsmuir*, *supra*, n. 1, at para. 53, citing *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; *Dr. Q*, *supra*, n. 4, at para. 29; *Suresh v. Canada (Minister of Employment and Immigration)*, [2002] 1 S.C.R. 3, at paras. 29-30.

<sup>13</sup> *Dunsmuir*, *supra*, n. 1, at paras 54 and 60, citing *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39; *Toronto (City) v. C.U.P.E., Local 79*, *supra*, n. 3, at para. 62. For a good post-*Dunsmuir* application on this point, see *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 41-42. An interesting question is what a court should do if the standard of review, correctness, has been established in earlier cases (*Dunsmuir*, para. 62), but the particular question is a legal question arising under a home statute, and so the post-*Dunsmuir* standard should be reasonableness. One court’s approach, without analysis, was simply to replicate the standard used under the pre-*Dunsmuir* case law: see *Martens v. Canada (Attorney General)*, 2008 FCA 240, at paras. 29-31.

<sup>14</sup> *Dunsmuir*, *supra*, n. 1, at para. 54, citing *Toronto (City) v. C.U.P.E., Local 79*, *supra*, n. 3, at para. 72.

<sup>15</sup> *Dunsmuir*, *supra*, n. 1, at para. 58, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 and *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504. See also *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

<sup>16</sup> True jurisdiction questions are those “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.” If the “tribunal [fails to] interpret the grant of authority correctly...its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.” See *Dunsmuir*, *supra*, n. 1, at para. 59, citing *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. Courts should be slow to brand as jurisdictional issues that

## (2) Review of procedural decisions

Today, it is well-established that a broad variety of tribunals owe parties before them some level of procedural fairness depending on the circumstances.<sup>17</sup> But not all tribunals fall into that category. For example, administrative decision-makers who act in a “legislative” manner, enacting general rules for the purposes of regulation, are not often subject to fairness obligations at common law.<sup>18</sup>

What tribunals are subject to obligations to afford parties procedural fairness? Once again, there is a test to be applied. This test consists of two broad inquiries, the second inquiry consisting of three subsidiary questions:<sup>19</sup>

- What does the legislation require?<sup>20</sup>

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are doubtfully so: *ibid.* An overly broad (improper) approach to characterizing an issue as jurisdictional would effectively reduce the tribunal’s authority to that of fact-finding: *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650 at para. 89.

<sup>17</sup> *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Before *Nicholson*, the “duty to act judicially” was thought to apply only to tribunals rendering decisions of a judicial or quasi-judicial nature, to the exclusion of those of an administrative nature.

<sup>18</sup> *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

<sup>19</sup> See, generally, *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227.

<sup>20</sup> The Legislature of Ontario and the Parliament of Canada are supreme, subject to the Constitution. Their laws must be obeyed, subject to the Constitution. Therefore, laws that dictate the procedures to be followed are, subject to the Constitution, conclusive of the procedures that must be applied. There is no room for the common law to operate in the face of a clear legislative dictation. See, generally, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

- If the legislation is silent, then the factors to consider are:
  - the nature of the decision;
  - the relationship between the decision-maker and the affected persons; and
  - the effect of the decision on rights, privileges and interests of affected persons.<sup>21</sup>

If, as a result of this test, the tribunal is subject to an obligation to afford parties procedural fairness, the tribunal must determine what sort of procedural fairness should be given. As the Supreme Court has repeatedly held, “[t]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”.<sup>22</sup>

If the legislation is clear on what sort of procedural fairness is required, that is the end of the inquiry. For example, if a tribunal’s governing statute requires that an oral hearing be held, an oral hearing must be held.

In the absence of any dictation by the tribunal’s governing statute, the tribunal determines the level of procedural fairness to be accorded to a party by applying a five-fold test.<sup>23</sup>

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<sup>21</sup> A decision that adjudicates specific rights of parties in a contested setting (sometimes called a *lis*) through specific fact-finding and the application of set standards to individual circumstances attracts obligations to afford procedural fairness. On the other hand, a decision that is based the development and application of general policy considerations to issues that have an import well beyond the interests of particular parties before the tribunal may be one where there are no obligations of procedural fairness. A good example would be a decision by a municipal council to pass a general by-law about littering: a particular company may have some interest in the issue, but unless its interest is particularly significant, and unless the by-law can be said to be targeted or directed at the company, the company will not have hearing rights. See, generally, *Canadian Pacific Railway*, *supra*, n. 18.

<sup>22</sup> *Knight*, *supra*, n. 19.

<sup>23</sup> *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817.

- What is the nature of the substantive decision made and the process followed in making it?<sup>24</sup>
- What is the nature of the statutory scheme and the terms on which the decision-maker operates?<sup>25</sup>
- What is the importance of the decision to affected individuals?<sup>26</sup>
- Do any affected individuals have legitimate expectations about the procedures that will be followed?<sup>27</sup>
- Has the tribunal itself made any choices concerning the procedures that normally will be followed in such circumstances?<sup>28</sup>

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<sup>24</sup> See *Baker, supra*, n. 23, at para. 23: “One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, n. 19, at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”

<sup>25</sup> See *Baker, supra*, n. 23, at para. 24: “The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted”.

<sup>26</sup> See *Baker, supra*, n. 23, at para. 25: “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”

<sup>27</sup> See *Baker, supra*, n. 23, at para. 26: “If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded... This doctrine, as applied in Canada, is based on the principle that the “circumstances” affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.”

<sup>28</sup> See *Baker, supra*, n. 22, at para. 27: This factor assumes importance “when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in



There are various procedural matters on which a tribunal can err. These include issues of type of hearing (written or oral), timing of the hearing, whether an adjournment should be granted, issues of adequate notice, whether full and timely pre-hearing disclosure has been made, rights to cross-examine or subpoena witnesses, production issues, the provision of adequate reasons, representation of a party by counsel, whether there has been bias and whether there has been an abuse of process. Jurisprudence has developed concerning all of these matters<sup>29</sup> and some important subsidiary tests have developed in particular areas of procedural fairness.<sup>30</sup>

Officially, reviewing courts do not engage in a standard of review analysis of procedural decisions made by tribunals.<sup>31</sup> However, the decided cases show that reviewing courts do defer somewhat to the decisions made by tribunals. Deference may be given to a tribunal's decision based on:

- the specific nature of the decision (factual determinations, discretionary remedial choices attract some deference);

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determining what procedures are appropriate in the circumstances” – the reviewing court should give “important weight” to “the choice of procedures made by the agency itself and its institutional constraints”.

<sup>29</sup> For an online enumeration of some of the recent cases, please feel free to consult the webpages listed at <http://www.davidstratas.com/admin.html>.

<sup>30</sup> See, for example, the test for independence and impartiality originally articulated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394 *per de Grandpré J.* (dissenting) and more recently referred to in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at para. 17: “what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?”

<sup>31</sup> *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 74 *per Arbour J.*: where an application for judicial review raises procedural fairness or natural justice issues, “no assessment of the appropriate standard of review” is required and the reviewing court should conduct “an assessment of the procedures and safeguards required in a particular situation.” See also *C.U.P.E., supra*, n. 3, at paras. 100-102.

- the statutory scheme (it can provide indications that decision-makers' decisions on procedure should be given some deference); and
- the decision-maker's expertise.

This is not the “pragmatic and functional test” for substantive review, although it does share some features with it.<sup>32</sup>

## **B. Unresolved questions arising from *Dunsmuir***

### **(1) What exactly is the standard of review of “reasonableness”?**

The Supreme Court of Canada reformulated the three categories of judicial review into two categories. The correctness standard still means the same. So what is left? Two sets of questions arise:

- *Translating the old to the new.* Has the old “patent unreasonableness standard” been abolished, leaving the old “reasonableness *simpliciter*” standard behind as “reasonableness review”? Or have the two standards been combined, making “reasonableness review” an amalgam of the old “patent unreasonableness” and “reasonableness *simpliciter*” standards of review?
- *The nature of the standard.* Is the standard of review of reasonableness a static standard that does not change with the circumstances, or is it a variable standard that does change with the circumstances?

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<sup>32</sup> See, generally, *Ministry of Community, Family and Children Services v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 (C.A.), at paras. 17-23.

*Translating the old to the new: what does the deferential standard mean?*

The majority judgment of Bastarache and LeBel JJ. in *Dunsmuir* emphasized that the patent unreasonableness and the reasonableness *simpliciter* standards were not really all that different. This was hardly a new observation: LeBel J. had been making this point for some time.<sup>33</sup> In this regard, the observation would seem to be valid: a decision in which, in the words of the reasonableness *simpliciter* standard, there are “no lines of reasoning [that could support] the decision”<sup>34</sup> is likely also one that, in the words of the patent unreasonableness standard, is “clearly irrational, that is to say evidently not in accordance with reason”<sup>35</sup> or “so flawed that no amount of curial deference can justify letting it stand”.<sup>36</sup> As a result, it would seem that the two standards are really the same and should be described in the same way.

*Dunsmuir* does not say this clearly. Under the heading “Defining the Concepts of Reasonableness and Correctness,” the majority judgment does not define the concept in useful, practical terms. The definition is as follows:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into

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<sup>33</sup> See *Toronto (City) v. C.U.P.E.*, *supra*, n. 3; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609.

<sup>34</sup> *Ryan*, *supra*, n. 3.

<sup>35</sup> *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-964 *per* Cory J.

<sup>36</sup> *Ryan*, *supra* n. 3, *per* Iacobucci J. Sometimes decisions that are so contrary to the purposes and policies of the legislation under which they are made are patently unreasonable: *C.U.P.E. v. Ontario (Minister of Labour)*, *supra*, n. 3. Purely punitive remedies that have no rational connection or that are unconstitutional will be patently unreasonable: *Royal Oak Mines Ltd. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 639. Sometimes where the available evidence is utterly incapable of rationally supporting a finding, patent unreasonableness will be present: *Toronto (City) v. O.S.S.T.F. District 15*, *supra*, n. 3.

the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.<sup>37</sup>

The Supreme Court cites no cases, but the language of this passage, particularly the last sentence, sounds reminiscent of the standard of review articulated in *Ryan*.<sup>38</sup>

That sentence, in speaking of a decision falling within a range of “defensible” outcomes, rather than in terms of the rationality of a decision, might be taken to place the standard of review below that articulated in *Ryan*, *i.e.*, that there are “no lines of reasoning supporting the decision which could reasonably lead [the] tribunal to reach the decision it did.”<sup>39</sup> But this does not appear to be the case: in the very next paragraph,<sup>40</sup> the majority judgment clearly tells us that “[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts.”

Buttressing this is the rationale offered for judicial review: the rule of law.<sup>41</sup> Court intervention despite the presence of a strongly worded privative clause – some might say defiance of the clear wording of a privative clause – is justified only by the requirement in the rule of law that subordinate bodies should not be immunized from review. On this rationale, only in the most extreme circumstances should a court intervene.<sup>42</sup>

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<sup>37</sup> *Dunsmuir*, *supra*, n. 1, at para. 47.

<sup>38</sup> *Supra*, n. 3.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Dunsmuir*, *supra*, n. 1, at para. 48.

<sup>41</sup> *Ibid.*, at paras. 29-31.

<sup>42</sup> Some support for this is found in *Dunsmuir*, *supra*, n. 1, at para. 42, in which the majority state that “[i]t is also inconsistent with the rule of law to retain an irrational decision.”

In the early days since *Dunsmuir*, courts have fallen mainly into two categories:

- Those that avoid the question by citing *Dunsmuir*, calling the standard a deferential standard, and/or quoting the above paragraph, and, in the end, adopting a standard of review that is quite deferential; or
- Those that go further and note that *Dunsmuir* does not significantly change the standard of review; most of these courts cite *Ryan* as the applicable test, or use *Ryan*-like words to describe the standard.<sup>43</sup>

Either way, not much has changed – in the words of *Dunsmuir*, it has not “pave[d] the way for a more intrusive review by courts.”

*The nature of the standard: a single standard or is there a ‘spectrum’ within it?*

The concurring reasons of Binnie J. in *Dunsmuir* suggest that within the new deferential standard of reasonableness is a spectrum of standards.<sup>44</sup> The majority reasons are silent on the issue, though the generality of what it says on the issue (see passage above) offers some wiggle room. Certainly, the old reasonableness *simpliciter* standard was a single standard that did not encompass a range of standards.<sup>45</sup>

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<sup>43</sup> See, e.g., *Mills*, *supra*, n. 3. *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, is interesting. At paras. 16, 22 and 23, the Court of Appeal suggests that the “reasonableness standard” means “clearly irrational,” but at para. 16 it also articulates the standard as “no lines of reasoning supporting the decision that could have reasonably led the tribunal to reach the decision that it did,” which is the formulation in *Ryan*, *supra*, n. 3. This particular tribunal enjoyed “patent unreasonableness” review, or “irrationality” review, before *Dunsmuir*.

<sup>44</sup> *Dunsmuir*, *supra*, n. 1, at paras. 139-152.

<sup>45</sup> *Ryan*, *supra*, n. 3, at paras. 43-44.

On the surface, there would appear to be a difference of views emerging on this in the courts below, but this may be a superficial difference. The British Columbia Supreme Court has found a sliding scale to be present within the reasonableness standard,<sup>46</sup> but the Ontario Court of Appeal has not.<sup>47</sup> However, while the Ontario Court of Appeal said it was rejecting the presence of a sliding scale, it acknowledged that the range of rational responses open and permissible to a tribunal might be broader or narrower, depending on the context: for example, a Minister's policy-based decision might have a wider range of permissible responses than a tribunal's decision on a legal question arising under its governing statute.<sup>48</sup> What this means is that, *de facto*, there will be a sliding standard.

**(2) Does *Dunsmuir* apply outside of judicial reviews of administrative tribunal decisions?**

The early answer would appear to be in the affirmative. The *Dunsmuir* standard of review analysis was applied in the case of a statutory appeal from an administrative decision-maker in *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*<sup>49</sup> and was also applied in the case of a Ministerial exercise of discretion in the area of extradition.<sup>50</sup>

**(3) What is a true issue of jurisdiction or *vires*?**

In *Dunsmuir*, the majority rules that true issues of jurisdiction or *vires* enjoy review on the standard of correctness. What these issues embrace is somewhat unclear. The Court

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<sup>46</sup> *Canadian Union of Postal Workers v. Canada Post Corporation*, 2008 BCSC 338, at para. 25.

<sup>47</sup> *Mills*, supra n. 3.

<sup>48</sup> *Ibid.*, at para. 22. This aspect of the *Mills* decision seems to have been approved by Evans J.A. in *Pharmascience Inc. v. Canada (Attorney General)*, 2008 FCA 258 at para. 4.

<sup>49</sup> 2008 SCC 32.

<sup>50</sup> *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.

provides three significant comments that help to answer this question. First, we are warned that this does not include the “extended definitions” of jurisdiction in *C.U.P.E.*<sup>51</sup> Then we are told that “jurisdiction” for these purposes will include the jurisdictional boundaries between two tribunals.<sup>52</sup> Finally, jurisdictional questions of *vires* such as those that happened in *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*<sup>53</sup> are included. That case concerned whether a by-law was authorized by a municipal statute. What is left unclear, however, is whether correctness will apply to *vires* questions where the subordinate legislation is authorized by the “home statute” of a tribunal. Elsewhere in *Dunsmuir*, we are told that tribunals will normally enjoy deference on their interpretations of provisions in their home statutes.<sup>54</sup> So what do we make of jurisdictional questions that arise under “home statutes”?<sup>55</sup>

#### (4) What is the standard of review for constitutional issues?

Early decisions of the Supreme Court affirm correctness review for constitutional issues,<sup>56</sup> and *Dunsmuir* repeats that position. The repetition of that position perpetuates an existing uncertainty. Some jurisprudence of the Supreme Court in constitutional cases

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<sup>51</sup> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227; *Dunsmuir*, *supra*, n. 1, para. 59.

<sup>52</sup> *Ibid.*, para. 61.

<sup>53</sup> *Supra*, n. 16.

<sup>54</sup> *Dunsmuir*, *supra*, n. 1, at para. 54.

<sup>55</sup> One approach to the question may be found in the post-*Dunsmuir* case of *Hibernia Management and Development Company Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2008 NLCA 46, at para. 57 (reasonableness standard applied). See also *Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, 2008 NSCA 74, at para. 61; *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273, at paras. 27-30; *Alberta v. Alberta Union of Provincial Employees*, 2008 ABCA 258, at para. 29.

<sup>56</sup> *Multani*, *supra*, n. 15; *Martin*, *supra*, n. 15, at para. 31; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 (*Seemle*, a standard of correctness was applied when considering whether a school board's decision was consistent with s. 15. Arbour J.A. in the Court of Appeal ((1995), 22 O.R. (3d) 1 at 7) specifically noted that the school board was normally entitled to deference but on constitutional questions the standard was correctness.)

suggests that there will be deference on exercises of discretion (mixed fact and law) by first instance adjudicators.<sup>57</sup> That jurisprudence is consistent with how the court normally deals with questions of mixed fact and law.<sup>58</sup> It is also consistent with *Dunsmuir* itself – deference is to be accorded to the “review of questions where the legal and factual issues are intertwined with and cannot be readily separated.”<sup>59</sup>

### (5) What is the role of privative clauses?

In my view, *Dunsmuir* represents a shift from earlier decisions<sup>60</sup> that emphasized that the process of determining the appropriate standard of review was really a question of ascertaining legislative intention. The role of privative clauses in determining the standard of review, in particular, seems to be de-emphasized.<sup>61</sup> At least one later court seems to have re-asserted the key role of privative clauses in determining standard of review.<sup>62</sup>

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<sup>57</sup> See, e.g., *R. v. Buhay*, [2003] 1 S.C.R. 631, at paras. 44-45; *R. v. Stillman*, [1997] 1 S.C.R. 607, at para. 68; *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 35; *R. v. Oickle*, [2000] 2 S.C.R. 3, at para. 22; *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, at paras. 188-189; *semble*, *R. v. Regan*, [2002] 1 S.C.R. 297; *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30; *Westcoast Energy Inc.*, *supra*, n. 15. But see the Supreme Court’s comment in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, para. 36, citing McLachlin J. (as she then was) in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136, that “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin.” There have been suggestions that review of “social” or “legislative” facts should be subject to a standard lower than palpable and overriding error: *RJR*, *supra*, at para. 174, *per* La Forest J. dissenting. For lower court applications of a deferential standard on a question of mixed fact and law in a constitutional case, see *(Attorney General) v. Misquadis*, 2003 FCA 473, *R v. Coates* (2003), 176 C.C.C. (3d) 215 (Ont. C.A.) and *R. v. Chang*, [2004] 6 W.W.R. 260 (Alta. C.A.), at para. 7.

<sup>58</sup> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401.

<sup>59</sup> *Dunsmuir*, *supra*, n. 1, at para. 53.

<sup>60</sup> See, e.g., *Pushpanathan*, *supra*, n. 5.

<sup>61</sup> *Dunsmuir*, *supra*, n. 1, at para. 52. Privative clauses are said in *Dunsmuir* to be a “strong indication” of deference, but they are “not determinative.”

<sup>62</sup> *Rodrigues*, *supra*, n. 43, at para. 22: the privative clause is “most important” and in this case the privative clause was “the toughest privative clause known to Ontario law,” so the standard of review was as high as “clearly irrational.” Curiously, the decision cites *Dunsmuir* at para. 45 and 48 for the proposition that the “privative clause” is “most important” but that does not appear to be mentioned in *Dunsmuir* at all.



**(6) What is a question of “general law” that warrants correctness review?**

In *Dunsmuir*, we are told that where “the question at issue is one of general law ‘that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise,’” the standard of review will be correctness.<sup>63</sup> This is because such a question has an “impact on the administration of justice as a whole,” and so “uniform and consistent answers” are required.<sup>64</sup> It is not known exactly what courts will regard as a question that is of central importance to the legal system as a whole and, except for providing us with the example of the *res judicata* issue in *Toronto (City) v. C.U.P.E.*, the Supreme Court gives us no criteria, definition or methodology.

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<sup>63</sup> *Dunsmuir*, *supra*, n. 1, at para. 60, citing (*Toronto (City) v. C.U.P.E.*, *supra*, n. 3, at para. 62, *per* LeBel J.). For a post-*Dunsmuir* application, see *Shier v. Manitoba Public Insurance Corp.*, 2008 MBCA 97 at para. 40, where there questions were not of “general law,” but had significance outside of the particular case, and so the standard of review was adjudged to be correctness.

<sup>64</sup> *Dunsmuir*, *supra*, n. 1, para. 60.